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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**OUTERBRIDGE ACCESS ASSOCIATION,
SUING ON BEHALF OF DIANE CROSS;
and DIANE CROSS, An Individual,**

Plaintiffs,

v.

**HOME DEPOT U.S.A., INC. d.b.a.
THE HOME DEPOT #6679; MIRA MESA
MARKETPLACE WEST, LLC; AND DOES 1
THROUGH 10, Inclusive,**

Defendants.

Case No.: 08cv0046 JM (JMA)

**PLAINTIFFS POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION TO AMEND
THE ORIGINAL COMPLAINT**

Date: April 18, 2008

Time: 1:30 P.M.

**Judge: Honorable Jeffrey Miller
Courtroom: 16**

I. PROCEDURAL HISTORY

The Original Complaint in the above entitled action was filed on January 8, 2008. On February 11, 2008, Defendant HOME DEPOT U.S.A., INC. d.b.a. THE HOME DEPOT #6679 filed an Answer to Plaintiffs' Civil Complaint. On February 12, 2008, Defendant MIRA MESA MARKETPLACE WEST, LLC filed a Motion to Dismiss Supplemental

1 State Law Claims. On February 22, 2008, HOME DEPOT U.S.A., INC.
2 d.b.a. THE HOME DEPOT #6679 filed a Notice of Joinder and Joinder
3 in Defendant MIRA MESA MARKETPLACE WEST, LLC's Motion For: The
4 Court to Decline Supplemental Jurisdiction over and to Dismiss
5 Plaintiffs' State Law Claims.

6 7 **II. CONCISE SET OF FACTS**

8 On January 26, 2007, Plaintiff CROSS went to Defendants'
9 public accommodation facilities known as HOME DEPOT U.S.A., INC.
10 d.b.a. THE HOME DEPOT #6679, (hereinafter "THE HOME DEPOT
11 #6679"), located at 10604 Westview Parkway, Mira Mesa, California
12 92126, Assessor Parcel Number: 318-600-03, to utilize their goods
13 and/or services accompanied by a friend. When Plaintiff CROSS
14 patronized Defendants' facilities, she was unable to use and/or
15 had difficulty using the public accommodations' facilities
16 including but not limited to the service counters, cashier
17 checkout aisle, and women's restroom facilities as said were not
18 accessible because they failed to comply with ADA Access
19 Guidelines For Buildings and Facilities (hereafter referred to as
20 "ADAAG" and codified in 28 C.F.R. Part 36, App. A) and/or
21 California's Title 24 Building Code Requirements. Defendants
22 failed to remove barriers to equal access within their public
23 accommodation facilities known as THE HOME DEPOT #6679.

24 Plaintiff CROSS personally experienced difficulty with said
25 access barriers at THE HOME DEPOT #6679. The following examples
26 of known barriers to access are not an exhaustive list of the
27 barriers to access that exist at Defendants' facilities. For
28 example, the Special Service counter and the Contractor Service

1 counter fail to be accessible, as they are impermissibly high and
2 fail to provide disabled signage.

3 There fails to be any designated accessible checkout aisles
4 displaying the required signage.

5 The women's restroom fails to be accessible, as the entrance
6 door to the women's restroom requires an excessive amount of
7 pressure to operate. The soap dispensers within the women's
8 restroom fail to be accessible, as they are mounted too high. The
9 feminine product dispenser within the women's restroom fails to
10 be accessible, as a bench impermissibly blocks access to this
11 dispenser.

12 **III. MOTION TO AMEND LEGAL STANDARDS**

13 Plaintiffs seek to amend their First Amended Complaint
14 pursuant to Rule 15, which is incorporated herein by reference.
15 Rule 15 allows a party to amend his pleading after a responsive
16 pleading was served only by leave of court or written consent by
17 the adverse party. The Ninth Circuit has held that "Rule 15's
18 policy of favoring amendments to pleadings should be applied with
19 extreme liberality." Eminence Capital, LLC v. Aspeon, Inc., 316
20 F.3d 1048, 1051 (9th Cir. 2003); see also, DCD Programs Ltd. V.
21 Leigton, 833 F.2d 183, 186 (9th Cir. 1987); see also, Morongo
22 Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir.
23 1990). "Parties may be... added by order of the court on motion of
24 any party or of its own initiative... at any stage of the action
25 and on such terms as are just" Nelson v. Adams USA, Inc., 529 US
26 460, 466-467, 120 S.Ct. 1579, 1584-1585 (2000). "Amendments
27 seeking to add *claims* are to be granted more freely than
28 amendments adding parties." Union Pac. R.R. Co. v. Nevada Power

1 Co., 950 F.2d 1429, 1432 (emphasis added) (9th Cir. 1991). Leave
2 to amend is within the sound discretion of the court, and "in
3 exercising its discretion, a court must be guided by the
4 underlying purpose of Rule 15 -- to facilitate decision on the
5 merits rather than on the pleading or technicalities." DCD
6 Programs Ltd., 833 F.2d at 185-186. Leave to amend should only
7 be denied where there is a showing of undue delay, bad faith or
8 dilatory motive, futility of amendment, prejudice to the opposing
9 party, and/or repeated failure to cure deficiencies by previous
10 amendments. Moore v. Kayport Package Express, Inc., 885 F.2d 531,
11 538 (9th Cir. 1989); see also Hurn v. Retirement Fund Trust, 648
12 F.2d 1252, 1254 (9th Cir. 1981). While all the factors are
13 important, the most important factor is prejudice to the opposing
14 party. William Inglis & Sons Baking Co. v. ITT Continental
15 Baking Co., 668 F.2d 1014, 1053 n. 68 (9th Cir. 1981). "Prejudice
16 is the touchstone of the inquiry under rule 15(a)." Eminence
17 Capital, LLC, 316 F.3d at 1052 (internal quotes omitted). To
18 justify denial of leave to amend, the prejudice must be
19 substantial. Morongo Band of Mission Indians, 893 F.2d at 1079.
20 Absent prejudice, or a strong showing of any of the remaining
21 reasons for denying leave to amend, "there exists a *presumption*
22 under Rule 15(a) in favor of granting leave to amend." Eminence
23 Capital, LLC, *supra*, 316 F.3d at 1052 (emphasis in original).
24 Additionally, the burden of proof is on the nonmoving party to
25 establish the basis for denying leave to amend. DCD Programs
26 Ltd., 833 F.2d at 187; see also, Shipner v. Eastern Airlines,
27 Inc., 868 F.2d 401, 406-407 (5th Cir. 1898).

1 **IV. MODIFICATIONS MADE IN PROPOSED FIRST AMENDED COMPLAINT**

2 The following lists every addition to the original Civil
3 Complaint and deletion from the original Civil Complaint that
4 exists within the [Proposed] First Amended Complaint pursuant to
5 CRC 327(a)(2) and (3). All Page numbers, paragraph numbers, and
6 lines numbers refer to the original Civil Complaint.

7 Page 1, Caption: **DELETED** the words, "CLASS ACTION" and ";
8 CIVIL CODE 51, 52, 54, 54.1, 54.3."

9 Page 2, Paragraph 3, Lines 26-27 continued to Page 3,
10 Paragraph 3, Lines 1-19: **DELETED** All OF PARAGRAPH 3, which
11 stated, " SUPPLEMENTAL JURISDICTION, 3. The Judicial District of
12 the United States District Court of the Southern District of
13 California has supplemental jurisdiction over the state claims as
14 alleged in this Complaint pursuant to 28 U.S.C. § 1367(a). The
15 reason supplemental jurisdiction is proper in this action is
16 because all the causes of action or claims derived from federal
17 law and those arising under state law, as herein alleged, arose
18 from common nucleus of operative facts. The common nucleus of
19 operative facts, include, but are not limited to, the incidents
20 where Plaintiffs were denied full and equal access to Defendants'
21 facilities, goods, and/or services in violation of both federal
22 and state laws when they attempted to enter, use, and/or exit
23 Defendants' facilities as described below within this Complaint.
24 Further, due to this denial of full and equal access, OUTERBRIDGE
25 ACCESS ASSOCIATION, SUING ON BEHALF OF DIANE CROSS and DIANE
26 CROSS, An Individual, and other persons with disabilities were
27 injured. Based upon the said allegations, the state actions, as
28 stated herein, are so related to the federal actions that they

1 form part of the same case or controversy and one would
2 ordinarily expect the actions to be tried in one judicial
3 proceeding."

4 Page 5, Paragraph 8, Lines 5-27, continued to Page 8,
5 Paragraph 11, Lines 1-2: **DELETED** ALL OF PARAGRAPHS 8-11, which
6 stated, "STATEWIDE CLASS ACTION ALLEGATIONS UNDER FED.R.CIV.P.
7 23(b) AS TO ALL DEFENDANTS 8. Plaintiffs are members of a group
8 within the State of California composed of persons with a wide
9 range of disabilities, limited to persons who use wheelchairs for
10 mobility, who must be able to access retail merchandise
11 establishments, like Defendants' establishments located at 10604-
12 10678 Westview Parkway, Mira Mesa, California 92126, Assessor
13 Parcel Number: 318-600-03. Plaintiffs are precluded from equal
14 access to Defendants' establishments so meaningfully because the
15 establishments, and each of them, fail to provide access for
16 members of the disability community who use a wheelchair for
17 mobility to the service counters, cashier checkout aisle, and
18 women's restroom within the facility. The Supreme Court of the
19 United States has held as long as the class representative
20 provides adequate representation for the class' interests, the
21 court has the power to adjudicate the rights and obligations of
22 all class members - even those who would otherwise be beyond the
23 reach of its personal jurisdiction. Phillips Petroleum Co. v.
24 Shutts, 472 US 797 (1985). This case stands for the proposition
25 that minimum contacts are not required with nonresident members
26 of a plaintiff class because, "the burdens placed by a State upon
27 absent class action plaintiff are not of the same order or
28 magnitude as those it places on an absent defendant." Id.

1 Plaintiffs allege they will insure class members shall receive
2 adequate notice of the proceedings and the opportunity to "opt
3 out," if required

4 9. Defendants have conducted themselves such as to establish a
5 pattern and practice of architectural discrimination. Plaintiffs
6 allege that Defendants have control over each and every facility,
7 establishment, and/or business located within the property
8 located at 10604-10678 Westview Parkway, Mira Mesa, California
9 92126, Assessor Parcel Number: 318-600-03. Accordingly,
10 Plaintiffs allege Defendants are responsible for removing
11 architectural barriers at Defendants' facilities and the
12 establishments/businesses contained therein.

13 10. For the aforementioned reasons, Plaintiffs allege they are
14 proper class representatives for members of the disability
15 community who use a wheelchair for mobility because the members
16 of the disability community who use a wheelchair for mobility are
17 so numerous that joinder is impracticable due to the fact more
18 than one hundred (100) persons fall within the membership
19 description. Also, the questions of law or fact are so common
20 because the members of the disability community who use a
21 wheelchair for mobility are being denied their civil rights under
22 federal and state laws - that is, each member of the disability
23 community who use a wheelchair for mobility suffered
24 substantially similar violations relating to the service
25 counters, cashier checkout aisle, and women's restroom within the
26 facility. Further, the claims or defenses of the representative
27 parties are typical - Plaintiffs have the right to access
28 facilities, establishments, and businesses like those within the

1 property located at 10604-10678 Westview Parkway, Mira Mesa,
2 California 92126, Assessor Parcel Number: 318-600-03, and the
3 businesses that are located thereon for many reasons including
4 without limitation the purchase of retail merchandise.
5 Defendants' facilities are open to the general public and
6 Plaintiffs have been denied access because of violations, as
7 outlined above and specifically addressed elsewhere within this
8 Civil Complaint.

9 11. Additionally, Plaintiffs, as the named representatives, will
10 fairly and adequately represent the interests of the class
11 because Plaintiffs and the members of the disability community in
12 the State of California who use a wheelchair for mobility have
13 suffered substantially similar violations. Finally, a pattern
14 and practice exists on the part of Defendants, and each of them,
15 of architectural discrimination at their public facilities
16 located within the State of California. On information and good
17 faith belief, Plaintiffs thereon allege that Defendants, prior to
18 the passing of the Americans With Disabilities Act in 1992,
19 conceived, commissioned, designed, and implemented among other
20 things, a design for their public facilities, including, but not
21 limited to the service counters, cashier checkout aisle, and
22 women's restroom within the facility which do not meet the
23 minimal standards outlined under the federal regulations known as
24 the Americans With Disabilities Act Accessibility Guidelines
25 ("ADAAG") and state regulations, also known as Title 24 of the
26 California Building Code, and to which non-compliant plan they
27 continue to utilize to the injury of the members of the class.
28 For these reasons and the facts as stated herein, Plaintiffs have

1 the right to maintain this statewide class action pursuant to
2 Fed.R.Civ.P. Rule 23(b)."

3 Page 8, Paragraph 13, Lines 25-26: **DELETED** the words,
4 "and/or California's Title 24 Building Code Requirements."

5 Page 10, Paragraph 19, Line 22: **DELETED** the words, "and
6 state"

7 Page 10, Paragraph 19, Line 25: **DELETED** the words, "and the
8 Civil Code"

9 Page 13, Paragraph 29, Line 17-19: **DELETED** the words, "the
10 path of travel to the altered area and the bathrooms, telephones,
11 and drinking fountains serving the altered area"

12 Page 14, Paragraph 30, Line 17: **DELETED** the word,
13 "following"

14 Page 14, Paragraph 30, Lines 17-25: **DELETED** the words, ":",
15 Space Allowance and Reach Ranges, Accessible Route, Protruding
16 Objects, Ground and Floor Surfaces, Parking and Passenger Loading
17 Zones, Curb Ramps, Ramps, Stairs, Elevators, Platform Lifts
18 (Wheelchair Lifts), Windows, Doors, Entrances, Drinking Fountains
19 and Water Coolers, Water Closets, Toilet Stalls, Urinals,
20 Lavatories and Mirrors, Sinks, Storage, Handrails, Grab Bars, and
21 Controls and Operating Mechanisms, Alarms, Detectable Warnings,
22 Signage, and Telephones"

23 Page 16, Paragraph 34, Lines 18-26 continued to Page 20,
24 Paragraph 43, Lines 1-24: **DELETED** ALL OF PARAGRAPHS 34-43, which
25 stated, " SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS - CLAIMS
26 UNDER CALIFORNIA ACCESSIBILITY LAWS

27 CLAIM I: Denial Of Full And Equal Access
28

34. Based on the facts plead at ¶¶ 12 - 20 above and elsewhere in this complaint, Plaintiff's Member and Plaintiff DIANE CROSS was denied full and equal access to Defendants' goods, services, facilities, privileges, advantages, or accommodations within a public accommodation owned, leased, and/or operated by Defendants as required by Civil Code Sections 54 and 54.1. Defendants' facility violated California's Title 24 Accessible Building Code by failing to provide access to Defendants' facilities due to violations pertaining to the Space Allowance and Reach Ranges, Accessible Route, Protruding Objects, Ground and Floor Surfaces, Parking and Passenger Loading Zones, Curb Ramps, Ramps, Stairs, Elevators, Platform Lifts (Wheelchair Lifts), Windows, Doors, Entrances, Drinking Fountains and Water Coolers, Water Closets, Toilet Stalls, Urinals, Lavatories and Mirrors, Sinks, Storage, Handrails, Grab Bars, and Controls and Operating Mechanisms, Alarms, Detectable Warnings, Signage, and Telephones.

35. These violations denied Plaintiff's Member and Plaintiff DIANE CROSS full and equal access to Defendants' facility. Thus, Plaintiff's Member and Plaintiff DIANE CROSS was subjected to discrimination pursuant to Civil Code §§ 51, 52, and 54.1 because Plaintiff's Member and Plaintiff DIANE CROSS was denied full, equal and safe access to Defendants' facility, causing severe emotional distress.

CLAIM II: Failure To Modify Practices, Policies And Procedures

36. Based on the facts plead at ¶¶ 12 - 20 above and elsewhere herein this complaint, Defendants failed and refused to provide a reasonable alternative by modifying its practices, policies, and procedures in that they failed to have a scheme, plan, or design

1 to assist Plaintiffs and/or others similarly situated in entering
2 and utilizing Defendants' services as required by Civil Code §
3 54.1. Thus, Plaintiff's Member and Plaintiff DIANE CROSS was
4 subjected to discrimination in violation of Civil Code § 54.1.

5 CLAIM III: Violation Of The Unruh Act

6 37. Based on the facts plead at ¶¶ 12 - 20 above and elsewhere
7 herein this complaint and because Defendants violated the Civil
8 Code § 51 by failing to comply with 42 United States Code §
9 12182(b)(2)(A)(iv) and 42 U.S.C. § 12183(a)(2), Defendants did
10 and continue to discriminate against Plaintiffs and persons
11 similarly situated in violation of Civil Code §§ 51, 52, and
12 54.1.

13 38. Based on the facts plead at ¶¶ 12 - 20 above, Claims I, II,
14 and III of Plaintiffs' Second Cause Of Action above, and the
15 facts elsewhere herein this complaint, Plaintiffs will suffer
16 irreparable harm unless Defendants are ordered to remove
17 architectural, non-architectural, and communication barriers at
18 Defendants' public accommodation. Plaintiffs allege that
19 Defendants' discriminatory conduct is capable of repetition, and
20 this discriminatory repetition adversely impacts Plaintiffs and a
21 substantial segment of the disability community. Plaintiffs
22 allege there is a state and national public interest in requiring
23 accessibility in places of public accommodation. Plaintiffs have
24 no adequate remedy at law to redress the discriminatory conduct
25 of Defendants. Plaintiffs desire to return to Defendants' places
26 of business in the immediate future. Accordingly, the Plaintiffs
27 allege that a structural or mandatory injunction is necessary to
28

1 enjoin compliance with state civil rights laws enacted for the
2 benefit of individuals with disabilities.

3 39. Wherefore, Plaintiffs pray for damages and relief as
4 hereinafter stated.

5 Treble Damages Pursuant To Claims I, II, III Under The California
6 Accessibility Laws

7 40. Defendants, each of them respectively, at times prior to and
8 including, the month of January of 2007, and continuing to the
9 present time, knew that persons with physical disabilities were
10 denied their rights of equal access to all portions of this public
11 facility. Despite such knowledge, Defendants, and each of them,
12 failed and refused to take steps to comply with the applicable
13 access statutes; and despite knowledge of the resulting problems
14 and denial of civil rights thereby suffered by Plaintiffs and
15 other similarly situated persons with disabilities. Defendants,
16 and each of them, have failed and refused to take action to grant
17 full and equal access to persons with physical disabilities in
18 the respects complained of hereinabove. Defendants, and each of
19 them, have carried out a course of conduct of refusing to respond
20 to, or correct complaints about, denial of disabled access and
21 have refused to comply with their legal obligations to make
22 Defendants' public accommodation facilities accessible pursuant
23 to the Americans With Disability Act Access Guidelines (ADAAG)
24 and Title 24 of the California Code of Regulations (also known as
25 the California Building Code). Such actions and continuing
26 course of conduct by Defendants, and each of them, evidence
27 despicable conduct in conscious disregard of the rights and/or
28 safety of Plaintiffs and of other similarly situated persons,

1 justifying an award of treble damages pursuant to sections 52(a)
2 and 54.3(a) of the California Civil Code.

3 41. Defendants, and each of their actions have also been
4 oppressive to persons with physical disabilities and of other
5 members of the public, and have evidenced actual or implied
6 malicious intent toward those members of the public, such as
7 Plaintiffs and other persons with physical disabilities who have
8 been denied the proper access to which they are entitled by law.
9 Further, Defendants, and each of their, refusals on a day-to-day
10 basis to correct these problems evidence despicable conduct in
11 conscious disregard for the rights of Plaintiffs and other
12 members of the public with physical disabilities.

13 42. Plaintiffs pray for an award of treble damages against
14 Defendants, and each of them, pursuant to California Civil Code
15 sections 52(a) and 54.3(a), in an amount sufficient to make a
16 more profound example of Defendants and encourage owners,
17 lessors/lessees, and operators of other public facilities from
18 willful disregard of the rights of persons with disabilities.
19 Plaintiffs do not know the financial worth of Defendants, or the
20 amount of damages sufficient to accomplish the public purposes of
21 section 52(a) of the California Civil Code and section 54.3 of
22 the California Civil Code.

23 43. Wherefore, Plaintiffs pray for damages and relief as
24 hereinafter stated."

25
26 Page 21, Sections A, B and C, Lines 1-10: DELETED ALL OF
27 SECTIONS A, B, and C, which stated, "A. For general damages
28 pursuant to Cal. Civil Code §§ 52 or 54.3;

1 B. For \$4,000 in damages pursuant to Cal. Civil Code § 52 for
2 each and every offense of Civil Code § 51, Title 24 of the
3 California Building Code, ADA, and ADA Accessibility Guidelines;

4 C. In the alternative to the damages pursuant to Cal. Civil
5 Code § 52 in Paragraph B above, for \$1,000 in damages pursuant to
6 Cal. Civil Code § 54.3 for each and every offense of Civil Code §
7 54.1, Title 24 of the California Building Code, ADA, and ADA
8 Accessibility Guidelines;"

9
10 Page 21, Section D, Lines 13-21: **DELETED** the words,
11 "related to the following: Space Allowance and Reach Ranges,
12 Accessible Route, Protruding Objects, Ground and Floor Surfaces,
13 Parking and Passenger Loading Zones, Curb Ramps, Ramps, Stairs,
14 Elevators, Platform Lifts (Wheelchair Lifts), Windows, Doors,
15 Entrances, Drinking Fountains and Water Coolers, Water Closets,
16 Toilet Stalls, Urinals, Lavatories and Mirrors, Sinks, Storage,
17 Handrails, Grab Bars, and Controls and Operating Mechanisms,
18 Alarms, Detectable Warnings, Signage, and Telephones"

19
20 Page 21, Section E, Line 23: **DELETED** the words, ", and Cal.
21 Code of Civil Procedure §§ 1032 and 1033.5"

22
23 Page 21, Section F, Lines 24-26: **DELETED** ALL OF SECTION F,
24 which stated, "F. For treble damages pursuant to Cal. Civil
25 Code §§ 52(a) or 54.3(a);
26 ///"

V. DEFENDANTS WILL NOT SUFFER PREJUDICE IF PLAINTIFFS' MOTION TO AMEND IS GRANTED

Defendants filed a motion presently pending before this court that is styled as a Motion to Dismiss to Dismiss Supplemental State Law Claims. The proposed First Amended Complaint addresses all issues raised by Defendants' Motion to Dismiss Supplemental State Law Claims. Within the proposed First Amended Complaint all state claims are removed. Also, at this early stage of the litigation, Defendants have ample time to engage in extensive discovery and prepare a defense for trial. Based on the above, Defendants will suffer no prejudice and the action will not be delayed if this motion is granted.

VI. CONCLUSION

For all of the above reasons, we respectfully request Plaintiffs' Motion To Amend the Original Complaint be granted and to permit the filing of the proposed First Amended Complaint as attached to the Declaration Of Michelle L. Wakefield or as otherwise directed by the Court.

Respectfully submitted:

PINNOCK & WAKEFIELD, A.P.C.

Dated: March 5, 2008

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